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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1733

CULLUM ELECTRIC & MECHANICAL, INC.,
PETITIONER,

versus

MECHANICAL CONTRACTORS ASSOCIATION OF SOUTH CAROLINA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

L. G. FUNDERBURK,
Post Office Box 716,
Columbia, South Carolina 29202,

L. HENRY McKELLAR,
Post Office Box 168,
Columbia, South Carolina 29202,

Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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OPINIONS BELOW

The opinions of the lower courts are adequately referenced in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does the operation of a trade association's bid procedure which only establishes a time limitation for the submission of bids and is applied to non-members on the same basis as members violate the anti-trust laws?

2. Was the Petitioner denied a valuable right without being afforded notice, a hearing, and an opportunity to be heard?

STATEMENT OF THE CASE

The Statement of Facts of Petitioner should be supplemented and amended as follows:

The specific regulation complained of by Petitioner is referred to as the "five hour bid procedure" instituted by the Respondent in approximately 1957. This five hour bid procedure is printed in the form of an agreement for execution by the various general contractors in South Carolina under which they endorse and adopt a procedure for receiving bids on contracts from mechanical contractors.

It provides in relevant part:

> 1. On jobs where the time of general bid filing is 1 o'clock, p.m., or later, we as a general contractor will not accept bids from any mechanical contractors, in the above stated classification, unless they are received five hours prior to the time of general bid filing, provided, however, in the event the mechanical contractors file their bids with the Western Union office five hours prior to the time of bid opening, then in such event, we as a general contractor will accept such filing in lieu of the five hour provision above stated, and require the mechanical contractor's bid be received not later than four hours prior to the time of the general bid filing.

As can readily be seen from reading the short procedure, no distinction is made between members and non-members.

The five hour bid procedure was established shortly after the Associated General Contractors devised a four hour bid procedure. This four hour bid procedure was designed to create a system of receiving prices on sub-contracts and materials in sufficient time to allow general contractor to analyze and evaluate sub-bids and material prices, in his own bid, prior to the general bid filing. Under this procedure general contractors refused to receive sub-bids after four hours prior to the time of the general bid filing.

This four hour procedure solves most of the problems which generals encountered in the bidding process, but created a four hour period in which "bid peddling", *i.e.*, disclosure of the bid of one or more mechanicals in an effort to pressure others into reducing, prior to the four hour deadline, the bids which they had already submitted or were in the process of submitting, could occur.

The five hour procedure set forth above was designed to eliminate "bid peddling" by requiring sub-bids to be filed with Western Union, and thus frozen, five hours prior to the general bid filing. Mechanical contractors would then have one hour to communicate their bids to the general contractor before the four hour deadline and know that their bid and those of others could not be changed.

The lower court found as a fact that the Petitioner was charged with knowledge of the application of the five hour bid procedure to the Lander College Library construction project.

The Plaintiff introduced no evidence of any agreement of the Respondent to exclude him from business in any way other than the five hour bid procedure.

ARGUMENT

I. The conclusion reached by the Fourth Circuit Court of Appeals is correct and in no way conflicts with *Mechanical Bid Depository v. Christiansen,* 353 F. 2d 817 (10th Cir. 1965).

The facts in the *Christiansen* case are clearly distinguishable in that a bid depository system was used and general contractors were precluded from receiving bids other than through the bid depository. In the case of the five hour procedure of the Respondent, there is no such exclusionary rule which prevents general contractors from using bids from sub-contractors not submitted through the procedure. In the *Christiansen* case the Plaintiff was excluded from a substantial segment of the market because of his non-affiliation with the bid depository. In the case at bar evidence clearly showed that the Petitioner was not excluded from any segment of the industry nor was it deprived of an important or even an unimportant business advantage. (A. 35, 36.) All mechanical contractors, members and non-members alike, are subject to the same time limitation and none are foreclosed from access to the market unless they elect not to comply with the time limitation.

A careful reading of the decision will reveal that neither the Tenth Circuit nor the lower court found that the time limitation provision standing alone would violate the anti-trust laws. Other cases likewise failing to reach this conclusion include *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Const. Co.,* 93 Cal. Rptr. 602, 482 P. 2d 226 (S. Ct. Cal. 1971); *Swenson Co., Inc. v. E. C. Braun Co.,* 77 Cal. Rptr. 378 (D. Ct. App. Cal. 1969); *People v. Association of Contracting Plumbers,* 57 Misc. 2d 256 (Sup. Ct. N. Y. 1968); *People v. Inland Bid Depository,* 44 Cal. Rptr. 206 (D. Ct. App. Cal. 1965).

The Fourth Circuit was correct in finding that the procedure was designed to avoid the chaotic situation resulting when general contractors received bids from sub-contractors only minutes before the deadline for submission of their bids, while guarding against the use of one sub-contractor's bid to prevail upon another to revise his bid to a still lower figure. (A. 11, 12.)

II. *Silver v. New York Stock Exchange,* 373 U. S. 341, 10 L. Ed. 389, 83 S. Ct. 1246 (1963) is not controlling.

In *Silver,* there was a group boycott depriving Petitioners of a valuable business service which they needed to compete effectively. The deprivation took place without first informing the Petitioner of the charges against them or affording them an opportunity to explain or refute the charges. This action clearly violated the anti-trust laws.

In the present case there was no denial of a valuable business right nor was Petitioner deprived of an important or even unimportant business advantage and thus there was no violation of the anti-trust laws.

The record reveals that correspondence from the attorneys for the Petitioner set forth the Petitioner's position in full and, in addition, included a thirty-one (31) page memorandum of all facts and legal positions. The lower court correctly found that the parties were in possession of all facts concerning the controversy as a result of the correspondence between them. There was no request or demand for any formal hearing of any type.

CONCLUSION

In summary, the principles of law governing the presence or absence of a violation of the anti-trust laws have been established by this Court. The decision of the Court of Appeals correctly applies these principles to the facts of this case. There is no important question of federal law raised which conflicts with the opinions of this Court and there is no conflict with the decision of another Court of Appeals on the same matter. Therefore the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

L. G. FUNDERBURK,
L. HENRY McKELLAR,
Attorneys for Respondent.

By: L. HENRY McKELLAR,

Dated: September 15, 1978.

APPENDIX